

By: Hartnett

H.B. No. 2725

A BILL TO BE ENTITLED

AN ACT

relating to the determination of incompetency in criminal cases.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 2(a), Article 42.03, Code of Criminal Procedure, is amended to read as follows:

(a) In all criminal cases the judge of the court in which the defendant is convicted shall give the defendant credit on the defendant's sentence for the time that the defendant has spent:

(1) in jail for the case, including confinement served as described by Article 46B.009 and excluding ~~[other than]~~ confinement served as a condition of community supervision, from the time of his arrest and confinement until his sentence by the trial court; ~~or~~

(2) in a substance abuse treatment facility operated by the Texas Department of Criminal Justice under Section 493.009, Government Code, or another court-ordered residential program or facility as a condition of deferred adjudication community supervision granted in the case if the defendant successfully completes the treatment program at that facility; or

(3) confined in a mental health facility or residential care facility as described by Article 46B.009.

SECTION 2. Article 46B.009, Code of Criminal Procedure, is amended to read as follows:

Art. 46B.009. TIME CREDITS. A court sentencing a person

1 convicted of a criminal offense shall credit to the term of the
2 person's sentence the time the person is confined in a mental health
3 facility, residential care facility, or jail:

4 (1) pending a determination [trial] under Subchapter C
5 as to the defendant's competency to stand trial; or

6 (2) between the date of any initial determination of
7 the defendant's incompetency under that subchapter and the date the
8 person is transported to jail following a final judicial
9 determination that the person has been restored to competency.

10 SECTION 3. Article 46B.0095, Code of Criminal Procedure, is
11 amended to read as follows:

12 Art. 46B.0095. MAXIMUM PERIOD OF [~~FACILITY~~] COMMITMENT OR
13 OUTPATIENT TREATMENT PROGRAM PARTICIPATION DETERMINED BY MAXIMUM
14 TERM FOR OFFENSE. (a) A defendant may not, under Subchapter D or E
15 or any other provision of this chapter, be committed to a mental
16 hospital or other inpatient or residential facility, ordered to
17 participate in an outpatient treatment program, or subjected to
18 both inpatient and outpatient treatment for a cumulative period
19 that exceeds the maximum term provided by law for the offense for
20 which the defendant was to be tried, except that if the defendant is
21 charged with a misdemeanor and has been ordered only to participate
22 in an outpatient treatment program under Subchapter D or E, the
23 maximum period of restoration is two years [~~beginning on the date of~~
24 ~~the initial order for outpatient treatment program participation~~
25 ~~was entered]~~.

26 (b) On expiration of the maximum restoration period under
27 Subsection (a), the defendant may be confined for an additional

1 period in a mental hospital or other inpatient or residential
2 facility or ordered to participate for an additional period in an
3 outpatient treatment program, as appropriate, only pursuant to
4 civil [~~commitment~~] proceedings conducted under Subtitle C or D,
5 Title 7, Health and Safety Code, by a court with probate
6 jurisdiction.

7 (c) The cumulative period described by Subsection (a):

8 (1) begins on the date the initial order of commitment
9 or initial order for outpatient treatment program participation is
10 entered under this chapter; and

11 (2) in addition to any inpatient or outpatient
12 treatment periods described by Subsection (a), includes any time
13 that, following the entry of an order described by Subdivision (1),
14 the defendant is confined in a correctional facility, as defined by
15 Section 1.07, Penal Code, or is otherwise in the custody of the
16 sheriff during or while awaiting, as applicable:

17 (A) the defendant's transfer to a mental hospital
18 or other inpatient or residential facility;

19 (B) the defendant's release on bail to
20 participate in an outpatient treatment program; or

21 (C) a criminal trial following any temporary
22 restoration of the defendant's competency to stand trial.

23 (d) The court shall credit to the cumulative period
24 described by Subsection (a) any time that a defendant, following
25 arrest for the offense for which the defendant was to be tried, is
26 confined in a correctional facility, as defined by Section 1.07,
27 Penal Code, before the initial order of commitment or initial order

1 for outpatient treatment program participation is entered under
2 this chapter.

3 SECTION 4. Article 46B.022(a), Code of Criminal Procedure,
4 is amended to read as follows:

5 (a) To qualify for appointment under this subchapter as an
6 expert, a psychiatrist or psychologist must:

7 (1) as appropriate, be a physician licensed in this
8 state or be a psychologist licensed in this state who has a doctoral
9 degree in psychology; and

10 (2) have the following certification [~~or experience~~]
11 or training:

12 (A) as appropriate, certification by:

13 (i) the American Board of Psychiatry and
14 Neurology with added or special qualifications in forensic
15 psychiatry; or

16 (ii) the American Board of Professional
17 Psychology in forensic psychology; or

18 (B) [~~experience or~~] training consisting of:

19 (i) at least 24 hours of specialized
20 forensic training relating to incompetency or insanity
21 evaluations; and

22 (ii) at least [~~for an appointment made~~
23 ~~before January 1, 2005, at least five years of experience before~~
24 ~~January 1, 2004, in performing criminal forensic evaluations for~~
25 ~~courts, or~~

26 [(iii) ~~for an appointment made on or after~~
27 ~~January 1, 2005, at least five years of experience before January 1,~~

1 ~~2004, in performing criminal forensic evaluations for courts and]~~
2 eight [~~or more~~] hours of continuing education relating to forensic
3 evaluations, completed in the 12 months preceding the appointment
4 [~~and documented with the court~~].

5 SECTION 5. Article 46B.024, Code of Criminal Procedure, is
6 amended to read as follows:

7 Art. 46B.024. FACTORS CONSIDERED IN EXAMINATION. During an
8 examination under this subchapter and in any report based on that
9 examination, an expert shall consider, in addition to other issues
10 determined relevant by the expert, the following:

11 (1) the capacity of the defendant during criminal
12 proceedings to:

13 (A) rationally understand the charges against
14 the defendant and the potential consequences of the pending
15 criminal proceedings;

16 (B) disclose to counsel pertinent facts, events,
17 and states of mind;

18 (C) engage in a reasoned choice of legal
19 strategies and options;

20 (D) understand the adversarial nature of
21 criminal proceedings;

22 (E) exhibit appropriate courtroom behavior; and

23 (F) testify;

24 (2) as supported by current indications and the
25 defendant's personal history, whether the defendant:

26 (A) has a [diagnosable] mental illness; or

27 (B) [~~or~~] is a person with mental retardation;

1 (3) whether the identified condition has lasted or is
2 expected to last continuously for at least one year;

3 (4) the degree of impairment resulting from [~~impact~~
4 ~~of~~] the mental illness or mental retardation, if existent, and the
5 specific impact on the defendant's capacity to engage with counsel
6 in a reasonable and rational manner; and

7 (5) [~~(4)~~] if the defendant is taking psychoactive or
8 other medication:

9 (A) whether the medication is necessary to
10 maintain the defendant's competency; and

11 (B) the effect, if any, of the medication on the
12 defendant's appearance, demeanor, or ability to participate in the
13 proceedings.

14 SECTION 6. Articles 46B.025(a) and (b), Code of Criminal
15 Procedure, are amended to read as follows:

16 (a) An expert's report to the court must state an opinion on
17 a defendant's competency or incompetency to stand trial or explain
18 why the expert is unable to state such an opinion and must also:

19 (1) identify and address specific issues referred to
20 the expert for evaluation;

21 (2) document that the expert explained to the
22 defendant the purpose of the evaluation, the persons to whom a
23 report on the evaluation is provided, and the limits on rules of
24 confidentiality applying to the relationship between the expert and
25 the defendant;

26 (3) in specific [~~general~~] terms, describe procedures,
27 techniques, and tests used in the examination, and [~~and~~] the purpose of

1 each procedure, technique, or test, and the conclusions reached;
2 and

3 (4) state the expert's clinical observations,
4 findings, and opinions on each specific issue referred to the
5 expert by the court, state the specific criteria supporting the
6 expert's diagnosis, and state specifically any issues on which the
7 expert could not provide an opinion.

8 (b) If in the opinion of an expert appointed under Article
9 46B.021 the defendant is incompetent to proceed, the expert shall
10 state in the report:

11 (1) the symptoms, exact nature, severity, and expected
12 duration of the deficits resulting from the defendant's mental
13 illness or mental retardation, if any, and the [that] impact of the
14 identified condition on the factors listed in Article 46B.024[
15 ~~contributing to the defendant's incompetency]; [and]~~

16 (2) an estimate of the period needed to restore the
17 defendant's competency, including whether the defendant is likely
18 to be restored to competency in the foreseeable future; and

19 (3) prospective treatment options, if any,
20 appropriate for the defendant.

21 SECTION 7. Article 46B.071, Code of Criminal Procedure, is
22 amended to read as follows:

23 Art. 46B.071. OPTIONS ON DETERMINATION OF INCOMPETENCY.

24 (a) Except as provided by Subsection (b), on [On] a determination
25 that a defendant is incompetent to stand trial, the court shall:

26 (1) commit the defendant to a facility under Article
27 46B.073; or

1 (2) release the defendant on bail under Article
2 46B.072.

3 (b) On a determination that a defendant is incompetent to
4 stand trial and is unlikely to be restored to competency in the
5 foreseeable future, the court shall:

6 (1) proceed under Subchapter E or F; or

7 (2) release the defendant on bail as permitted under
8 Chapter 17.

9 SECTION 8. Article 46B.072, Code of Criminal Procedure, is
10 amended by amending Subsections (a), (b), and (c) and adding
11 Subsection (a-1) to read as follows:

12 (a) This article applies only to a defendant who is subject
13 to an initial restoration period based on Article 46B.071.

14 (a-1) Subject to conditions reasonably related to assuring
15 public safety and the effectiveness of the defendant's treatment,
16 if the court determines that a defendant found incompetent to stand
17 trial is not a danger to others and may be safely treated on an
18 outpatient basis with the specific objective of attaining
19 competency to stand trial and if an appropriate outpatient
20 treatment program is available for the defendant, the court:

21 (1) may release on bail a defendant found incompetent
22 to stand trial with respect to a felony or may continue the
23 defendant's release on bail; and

24 (2) shall release on bail a defendant found
25 incompetent to stand trial with respect to a misdemeanor or shall
26 continue the defendant's release on bail.

27 (b) The court shall order a defendant released on bail under

1 Subsection (a-1) [~~(a)~~] to participate in an outpatient treatment
2 program for a period not to exceed 120 days.

3 (c) Notwithstanding Subsection (a-1) [~~(a)~~], the court may
4 order a defendant to participate in an outpatient treatment program
5 under this article only if:

6 (1) the court receives and approves a comprehensive
7 plan that:

8 (A) provides for the treatment of the defendant
9 for purposes of competency restoration; and

10 (B) identifies the person who will be responsible
11 for providing that treatment to the defendant; and

12 (2) the court finds that the treatment proposed by the
13 plan will be available to and will be provided to the defendant.

14 SECTION 9. Articles 46B.073(a) and (b), Code of Criminal
15 Procedure, are amended to read as follows:

16 (a) This article applies only to a defendant not released on
17 bail who is subject to an initial restoration period based on
18 Article 46B.071.

19 (b) For further examination and treatment toward the
20 specific objective of the defendant attaining competency to stand
21 trial, the [~~The~~] court shall commit a defendant described by
22 Subsection (a) to a mental health facility or residential care
23 facility for the applicable [~~a~~] period as follows:

24 (1) a period of not more than 60 days, if the defendant
25 is charged with an offense punishable as a misdemeanor; or

26 (2) a period of not more than 120 days, if the
27 defendant is charged with an offense punishable as a felony [~~not to~~]

1 ~~exceed 120 days for further examination and treatment toward the~~
2 ~~specific objective of attaining competency to stand trial].~~

3 SECTION 10. Subchapter D, Chapter 46B, Code of Criminal
4 Procedure, is amended by adding Article 46B.0755 to read as
5 follows:

6 Art. 46B.0755. PROCEDURES ON CREDIBLE EVIDENCE OF IMMEDIATE
7 RESTORATION. (a) Notwithstanding any other provision of this
8 subchapter, if the court receives credible evidence indicating that
9 the defendant has been restored to competency at any time after the
10 defendant's incompetency trial under Subchapter C but before the
11 defendant is transported under Article 46B.075 to a mental health
12 facility, residential care facility, or outpatient treatment
13 program, as applicable, the court may appoint disinterested experts
14 to reexamine the defendant in accordance with Subchapter B. The
15 court is not required to appoint the same expert or experts who
16 performed the initial examination of the defendant under that
17 subchapter.

18 (b) If after a reexamination of the defendant the applicable
19 expert's report states an opinion that the defendant remains
20 incompetent, the court's order under Article 46B.072 or 46B.073
21 remains in effect, and the defendant shall be transported to the
22 facility or outpatient treatment program as required by Article
23 46B.075. If after a reexamination of the defendant the applicable
24 expert's report states an opinion that the defendant has been
25 restored to competency, the court shall withdraw its order under
26 Article 46B.072 or 46B.073 and proceed under Subsection (c) or (d).

27 (c) The court shall find the defendant competent to stand

1 trial and proceed in the same manner as if the defendant had been
2 found restored to competency at a hearing if:

3 (1) both parties agree that the defendant is competent
4 to stand trial; and

5 (2) the court concurs.

6 (d) The court shall hold a hearing to determine whether the
7 defendant has been restored to competency if any party fails to
8 agree or if the court fails to concur that the defendant is
9 competent to stand trial. If a court holds a hearing under this
10 subsection, on the request of the counsel for either party or the
11 motion of the court, a jury shall make the competency
12 determination. For purposes of the hearing, incompetency is
13 presumed, and the defendant's competency must be proved by a
14 preponderance of the evidence. If after the hearing the defendant
15 is again found to be incompetent to stand trial, the court shall
16 issue a new order under Article 46B.072 or 46B.073, as appropriate
17 based on the defendant's current condition.

18 SECTION 11. Article 46B.077(a), Code of Criminal Procedure,
19 is amended to read as follows:

20 (a) The facility to which the defendant is committed or the
21 outpatient treatment program to which the defendant is released on
22 bail shall:

23 (1) develop an individual program of treatment;

24 (2) assess and evaluate whether the defendant is
25 likely to be restored to [~~will obtain~~] competency in the
26 foreseeable future; and

27 (3) report to the court and to the local mental health

1 authority or to the local mental retardation authority on the
2 defendant's progress toward achieving competency.

3 SECTION 12. Article 46B.079, Code of Criminal Procedure, is
4 amended to read as follows:

5 Art. 46B.079. NOTICE AND REPORT TO COURT. (a) The head of
6 the facility or the provider of the outpatient treatment program,
7 as appropriate, not later than the 15th day before the date on which
8 the initial [a] restoration period is to expire according to the
9 terms of the order or under Article 46B.0095 or other applicable
10 provisions of this chapter, shall notify the applicable court that
11 the [~~restoration~~] period is about to expire.

12 (b) The head of the facility or outpatient treatment program
13 provider shall promptly notify the court when the head of the
14 facility or outpatient treatment program provider believes that:

15 (1) the defendant has attained competency to stand
16 trial; or

17 (2) the defendant is not likely to [~~will not~~] attain
18 competency in the foreseeable future.

19 (c) When the head of the facility or outpatient treatment
20 program provider gives notice to the court under Subsection (a) or
21 (b), the head of the facility or outpatient treatment program
22 provider also shall file a final report with the court stating the
23 reason for the proposed discharge under this chapter and including
24 a list of the types and dosages of medications prescribed for [~~with~~
25 ~~which~~] the defendant [~~was treated for mental illness~~] while the
26 defendant was in the facility or participating in the outpatient
27 treatment program. To enable any objection to the findings of the

1 report to be made in a timely manner under Article 46B.084(a), the
2 court shall provide copies of the report to the attorney
3 representing the defendant and the attorney representing the state.

4 (d) If the head of the facility or outpatient treatment
5 program provider notifies the court that the initial restoration
6 period is about to expire, the notice may contain a request for an
7 extension of the period for an additional period of 60 days and an
8 explanation for the basis of the request. An explanation provided
9 under this subsection must include a description of any evidence
10 indicating a reduction in the severity of the defendant's symptoms
11 or impairment.

12 SECTION 13. Articles 46B.080(b) and (c), Code of Criminal
13 Procedure, are amended to read as follows:

14 (b) The court may enter an order under Subsection (a) only
15 if the court determines that [~~on the basis of information provided~~
16 ~~by the head of the facility or the treatment program provider~~]:

17 (1) the defendant has not attained competency; and

18 (2) an extension of the initial restoration period
19 will likely enable the facility or program to restore the defendant
20 to competency within the period of the extension.

21 (c) The court may grant only one 60-day extension under this
22 article in connection with the specific offense with which the
23 defendant is charged [~~for a period of restoration ordered under~~
24 ~~this subchapter~~].

25 SECTION 14. Article 46B.084(a), Code of Criminal Procedure,
26 is amended to read as follows:

27 (a) On the return of a defendant to the court, the court

1 shall make a determination with regard to the defendant's
2 competency to stand trial. The court may make the determination
3 based [~~solely~~] on the report filed under Article 46B.079(c) and on
4 other medical information or personal history information relating
5 to the defendant. A [~~, unless any~~] party may object [~~objects~~] in
6 writing or in open court to the findings of the report not later
7 than the 15th day after the date on which the court received
8 notification under Article 46B.079. The court shall make the
9 determination not later than the 20th day after the date on which
10 the court received notification under Article 46B.079, regardless
11 of whether a party objects to the report as described by this
12 subsection and the issue is set for hearing under Subsection (b).

13 SECTION 15. Article 46B.086(a), Code of Criminal Procedure,
14 is amended to read as follows:

15 (a) This article applies only to a defendant:

16 (1) who is determined under this chapter to be
17 incompetent to stand trial;

18 (2) who either:

19 (A) remains confined in a correctional facility,
20 as defined by Section 1.07, Penal Code, for a period exceeding 72
21 hours while awaiting transfer to an inpatient mental health
22 facility, a residential care facility, or an outpatient treatment
23 program;

24 (B) is committed to an inpatient mental health
25 facility or a residential care facility for the purpose of
26 competency restoration;

27 (C) is confined in a correctional facility while

1 awaiting further criminal proceedings following competency
2 restoration treatment; or

3 (D) is subject to Article 46B.072, if the court
4 has made the determinations required by Subsection (a-1) [~~(a)~~] of
5 that article;

6 (3) for whom a correctional facility that employs or
7 contracts with a licensed psychiatrist, an inpatient mental health
8 facility, a residential care facility, or an outpatient treatment
9 program provider has prepared a continuity of care plan that
10 requires the defendant to take psychoactive medications; and

11 (4) who, after a hearing held under Section 574.106,
12 Health and Safety Code, if applicable, has been found to not meet
13 the criteria prescribed by Sections 574.106(a) and (a-1), Health
14 and Safety Code, for court-ordered administration of psychoactive
15 medications.

16 SECTION 16. Article 46B.101, Code of Criminal Procedure, is
17 amended to read as follows:

18 Art. 46B.101. APPLICABILITY. This subchapter applies to a
19 defendant against whom a court is required to proceed according to
20 [~~under~~] Article 46B.084(e) or according to the court's appropriate
21 determination under Article 46B.071.

22 SECTION 17. Article 46B.151(a), Code of Criminal Procedure,
23 is amended to read as follows:

24 (a) If a court is required by Article 46B.084(f) or by its
25 appropriate determination under Article 46B.071 to proceed under
26 this subchapter, or if the court is permitted by Article 46B.004(e)
27 to proceed under this subchapter, the court shall determine whether

1 there is evidence to support a finding that the defendant is either
2 a person with mental illness or a person with mental retardation.

3 SECTION 18. The Department of State Health Services, in
4 coordination with the Health and Human Services Commission, shall
5 study the feasibility of providing home and community-based
6 services, instead of institutional care, to persons with severe and
7 persistent mental illness who have a history of more than one
8 inpatient forensic commitment under Chapter 46B, Code of Criminal
9 Procedure. Not later than December 1, 2012, the department shall
10 issue a report to the legislature regarding the results of the
11 feasibility study.

12 SECTION 19. The change in law made by this Act applies only
13 to a defendant with respect to whom any proceeding under Chapter
14 46B, Code of Criminal Procedure, is conducted on or after the
15 effective date of this Act.

16 SECTION 20. This Act takes effect September 1, 2011.